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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1558

THOMAS H. THEODOSOPOULOS,
Petitioner,

vs.

STATE OF NEW HAMPSHIRE
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF NEW HAMPSHIRE

RESPONDENT'S BRIEF IN OPPOSITION

The State of New Hampshire

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The Respondent, State of New Hampshire, through its attorneys, the Office of the Attorney General, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Opinion and Order of the Supreme Court of New Hampshire, reported at 409 A.2d. 1134 (August 17, 1979).

OPINIONS BELOW

The Opinion of the Supreme Court of New Hampshire is reported at 409 A.2d. 1134 (August 17, 1979). A copy of this Opinion is also included in the Appendix attached to the Petition for Writ of Certiorari as Appendix A.

It should be noted that the decision of the Supreme Court of New Hampshire was originally rendered on August 17, 1979, but was slightly modified on January 4, 1980, after Petitioner filed a Motion for Rehearing which was denied. See Appendix C. The copy of the Opinion contained in Appendix A reflects both the original text and the slight modifications later made by the Supreme Court of New Hampshire. The Opinion will also eventually be reported in Volume 119 of the New Hampshire Supreme Court Reports.

A copy of the unreported Opinion of the trial court, the Hillsborough County Superior Court, is contained in Appendix B.

JURISDICTION

The Opinion of the Supreme Court of New Hampshire was entered on August 17, 1979. A Motion for Rehearing was denied on January 4, 1980, but the Court slightly modified its original Opinion. The modified Opinion was issued on January 7,

1980, and the Petition for Writ of Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Should this Court grant the Petition for Writ of Certiorari where the decision below turns exclusively on its particular facts, where there is no conflict in lower court decisions, and where the decision below is correct?

CONSTITUTIONAL PROVISION INVOLVED

At issue in the instant case is the Fourth Amendment to the Constitution of the United States, as made applicable to the States by the Fourteenth Amendment.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

No State statutes are involved in the case at bar.

STATEMENT OF THE CASE

While it is Respondent's intention to keep the Brief in Opposition as short as possible, a detailed statement of the facts is necessary for two reasons. First, the decision of this Court turns on the particular facts of the case. Second, Respondent is not satisfied with the presentation of the facts made by Petitioner.

The appeal to the Supreme Court of New Hampshire arose from the trial court's denial of Petitioner's motion to suppress all evidence obtained as a direct and indirect result of a search made of his apartment by members of the Manchester, New Hampshire Police Department. All questions of law were transferred to the Supreme Court of New Hampshire through an interlocutory appeal. Petitioner has yet to stand trial. The relevant facts, as revealed in the transcript of the hearing on the suppression motion, are as follows.

The Manchester Police Station was more busy than usual during the early morning hours of December 31, 1977. Captain Evangelos Xiggoros was the officer in charge of the desk when Mrs. Dorothy Perreault was brought into the station. Earlier in the evening she complained that her son, Bruce, had pointed

a gun at her; she was brought to the station for her own safety.

In the lobby of the station, Captain Xiggoros and an Officer Tocci spoke to Mrs. Perrault, trying to determine where her son might be found. The time was approximately 12:55 a.m. on December 31, 1977.

A gunshot pierced the relative quiet of the police station. Captain Xiggoros and Mrs. Perreault fell, each seriously wounded.

What appeared to be smoke was observed near the stairs in the front portion of the lobby. Captain Xiggoros, who was still conscious and apparently assuming that Bruce Perreault had done the shooting, said, "Get that little so and so. He just shot me."

The next twenty minutes were marked by a high degree of confusion. Initially operating under the assumption that the assailant had fired from within the building, police were deployed around the outside of the station to prevent an escape. The building's interior lights were almost immediately turned off, and a search was begun of the inside of the station.

While this was happening, mobile units were called to the station area to block off the surrounding streets. Off-duty personnel were called in, while the

on-duty officers tried to organize as quickly as possible to effectuate the search of the station and remove the wounded. Deputy Chief Edmund LeBoeuf accurately described the scene when he arrived at approximately 1:20 a.m.

> "Everybody was in a situation where they didn't know what was happening. They knew a shot was fired and a couple people had been hit. They had the blocked area at that point surrounded and expected almost anything."

When the Deputy Chief arrived, he observed numerous police cruisers which had cordoned off the station. Police officers were in "crouched" positions, and they waved at the Deputy Chief, trying to warn him not to get out of his car. He was eventually able to procede along the darkened facade of the building and enter through the front door.

Other returning officers were met with similar receptions. Detective/Lieutenant John Crotty was approached by a policeman with his gun drawn. The officer told Crotty to "watch it" and not to proceed into the building until he was "sure it was safe." When Sergeant Louis Durette arrived at about 1:20 a.m., he

saw policemen hiding behind cement walls and in doorways. An officer hollered to Durette, "Sarge, keep down. We don't know where the sniper is." Thus, Sergeant Durette knew he might be facing a sniper situation even before he entered the station.

By the time LeBoeuf and Durette arrived, at about 1:20 a.m., it had been determined that the assailant was not in the station. The injured Captain Xiggoros and Mrs. Perreault were removed to the hospital by ambulance, and a city-wide search for Bruce Perreault got underway.

Sergeant Durette immediately began to organize and equip the Manchester Police Department Special Reaction Team. Durette testified that the Special Reaction Team [SRT] is a team of men "especially trained to respond to hostage, sniper, or other situations . . . ." They are equipped with automatic weapons, bullet-proof vests, shotguns, gas masks, and ropes to climb buildings.

While Durette was being briefed by Captain Murphy on the current status of the emergency, and his SRT team was preparing to move out, Durette noticed what appeared to be a bullet hole in the upper part of one of the large panels of glass which form the westerly wall of the police station lobby. Deputy Chief LeBoeuf also noticed the hole. The glass pane was shattered, and the hole itself

was about five or six inches in diameter. The hole was approximately ten or eleven feet above the lobby floor.

With this new information, Durette took his SRT group, consisting of eighteen men, directly across Chestnut Street to search the large church situated opposite the glass wall of the police station lobby. It was now between 1:45 a.m. and 1:50 a.m. The lights were still off in the station, but the focus of police attention became the city block west of the station -- the block which was separated from the station by Chestnut Street, bordered on the north by Manchester Street, and bordered on the south by Merrimack Street.

The search of the church revealed nothing, so Durette positioned his men outside while he went back to the station to reconsider the situation. LeBoeuf, Murphy, Durette and others then scrutinized the evidence in the lobby. By lining up the bullet hole in the window with the spots where Xiggoros and Mrs. Perreault had been standing, the men attempted to determine the approximate trajectory of the bullet, and thus discern the point of origin of the shot. The positions of Xiggoros and Perreault were determined from blood stains on the floor and a bullet hole in the wall.

While this reckoning was hampered slightly by the position of the police

department Christmas tree, the officers were able to conclude that the shot probably had been fired from the rear of some multi-story apartment building which faced Manchester Street. Durette took his SRT team and began an immediate search of those buildings.

The SRT squad was broken into two groups: one group covered the alleyways and rooftops; the other group searched the interior of the buildings. The search began with a grinder shop on the corner of Chestnut and Manchester Streets and gradually moved westward along Manchester Street. The search of these buildings began between 2:00 a.m. and 2:05 a.m.

The search proceeded through several stores with negative results, and eventually arrived at a four story apartment building, bearing an address of 83 Manchester Street. The time now was 2:15 a.m.

Durette took eight SRT members inside, while the remaining ten searched the back alleys and rooftop areas. The ground floor was clear; Durette left a man to guard and then moved on to the second floor. On this floor, the SRT men aroused one Mrs. Irene Berlinquette from her sleep, and told her there had been a shooting. They asked to search her apartment, and she consented. The search proved negative.

Durette and his men moved to the

third floor, where they pounded on the door and received no answer. There were three doors to the apartment; Durette could see light coming from the crack in one of the doors. However, no noise whatsoever was heard from within.

Durette went back to Mrs. Berlinquette, who told Durette that the Petitioner, Thomas Theodosopoulos, lived in the apartment and that if his four-wheel drive truck was parked outside, "he must be home." Mrs. Berlinquette testified that she never told the police anything about Petitioner's truck, but did recall telling them that she had heard no sounds from upstairs.

In all events, Sergeant Durette kept pounding on the door, again with no response. During this time, he sent members of the SRT to search the fourth floor and roof. They found nothing. It was determined, however, that Petitioner's truck was parked outside.

Durette then contacted Captain Murphy at the police station, and requested that the keys to the room be relayed from the landlord by police cruiser. At this point, Sergeant Tanguay, leader of one of the SRT squads, asked if his men could move on to do an interior search of the next building. Durette told them that it was SRT policy that one building had to be completely searched before another building search could be initiated.

When the keys arrived, they would not work. Durette summarized his feelings at this point:

> "I felt that the whole situation was very grave. I thought other people's lives were in danger, my life and everyone else's . . . . And that is the purpose I was there, to locate the person who did the shooting, so that no one else would get hurt." (emphasis supplied)

Having exhausted all other efforts to gain entry, Durette kicked open the weakest of the three doors, and headed toward the light in the apartment. The time of the entry was about 3:00 a.m. -- only two hours after the actual shooting. Durette and his men had been on the third floor for a total time of thirty minutes.

The police moved swiftly through a living room, where they observed nobody, down a short hallway and into the kitchen. In a room adjacent to the living room, marijuana was discovered. There was a bedroom to the right of the kitchen, and a bathroom to the left. All three of these rooms were on the alley side of the apartment, facing the police station. The Petitioner was found nude on a bed in the bedroom, but police were not able to arouse him. It was impossible to

determine if he was asleep, intoxicated, or feigning drowsiness. On a bureau in plain view were observed empty .350 caliber shell casings and a rifle scope. Another empty caliber casing was found on the floor of a side room.

Two men were left to guard the Petitioner, while the rest of the police continued to look for the presence of another person in the apartment. Durette testified that his men feared that somebody might spring out of a closet.

In the bathroom, the police observed a broken window. From this window, one could see (or shoot at) the glassed-in westerly wall of the police station.

Finally, a padlocked closet was discovered, but Deputy Chief LeBoeuf, who had just arrived on the scene, told the men, "Just leave it alone." It was not searched.

The Petitioner was eventually gotten to his feet, dressed, and taken to the police station along with the articles of evidence found at the scene.

Later in the morning, at about 6:00 a.m., a search warrant was obtained from Judge Capistran of the Manchester District Court for a search of Petitioner's car and locked closet. The warrant was issued on the basis of an affidavit by Lieutenant Crotty which included, inter alia, details

from Sergeant Durette, the observation of the shell casings, the broken bathroom window, and the trajectory of the path from the bathroom window to the police station. The search of Petitioner's locked closet uncovered a pellet rifle, a 16 gauge shotgun, and a .350 caliber rifle.

Petitioner was indicted by the Hillsborough County Grand Jury during the January term of 1978 for two counts of attempted manslaughter. On February 17, 1978, Defendant filed a pre-trial motion to suppress all physical evidence taken from his apartment and/or motor vehicle and to suppress all statements made by him during and subsequent to the entry of his apartment by members of the Manchester Police Department. A hearing was held on Defendant's suppression motion on April 6, 1978, before the Hillsborough County Superior Court, Flynn, P. J.

After considering all the evidence, the Court denied Petitioner's motion to suppress. The Court issued a lengthy opinion on April 25, 1978, detailing the reasons for the denial. See Appendix B.

On May 2, 1978, the Defendant filed a motion for an interlocutory appeal, which was granted by the Supreme Court of New Hampshire. Its Opinion, as modified, was issued on January 7, 1980, and is reported at 119 N.H. ____, 408 A.2d. 1134. See Appendix A.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW TURNS EXCLUSIVELY ON AN ANALYSIS OF THE FACTS, AND THE OUTCOME WILL NOT HAVE BROAD EFFECT ON OTHER CASES.

Because the search of Petitioner's apartment in the instant case was conducted without obtaining a judicially issued search warrant, the New Hampshire Supreme Court was called upon to decide whether the required probable cause plus exigent circumstances existed. See, Warden vs. Hayden, 387 U.S. 294 (1967). This determination calls for a detailed analysis of the particular facts of any case. Both the trial court and the Supreme Court of New Hampshire conducted a comprehensive and complete examination of the totality of the circumstances in the case at bar, and both courts determined that probable cause and exigent circumstances existed which justified the warrantless search. See, Opinion of Trial Court, Appendix B; and State vs. Theodosopoulos, 409 A.2d. 1134 (1979).

In the Petition for Writ of Certiorari, Petitioner's major argument amounts to little more than that the analysis of the facts by both State Courts was erroneous. No substantial issue of law is raised; the only real issue is a factual one. This is not the stuff out of which an appeal to the highest Court in the

land is made. This Court is and should be reluctant to review a case which turns exclusively on its own facts and involves no substantial issue of law. The instant case is such a case. For this reason alone it does not merit review.

Moreover, because the instant case involves a particular type of exigent circumstance, its application to other situations is extremely limited. That is, the exigent circumstance present here involves the so-called "emergency doctrine," for there existed a compelling need for immediate official action and a risk that the delay inherent in obtaining a warrant would present a substantial threat of imminent danger to life or public safety. See, Mincey vs. Arizona, 437 U.S. 385 (1978). The particular emergency present in the case at bar was the presence of a sniper -- a sniper who had already shot and wounded two people. This one particular fact -- the existence of a sniper who had already shown a propensity to kill -- necessarily pervades the entire case. It is the key fact justifying the emergency. And it is the fact that distinguishes it from all other situations involving exigent circumstances. The holding in the instant case is thus limited to similar sniper situations, a particularly narrow area. See, State vs. Max, 263 N.W.2d. 685 (S.D. 1978). In sum, because the decision below turns exclusively on an analysis of the underlying facts, and because that decision will not have

broad effect on other cases, it does not merit review by this Court.

II. THERE IS NO CONFLICT AMONG LOWER COURTS WHICH HAVE CONSIDERED THE EMERGENCY DOCTRINE IN CONNECTION WITH FACTUAL SITUATIONS SUBSTANTIALLY SIMILAR TO THE INSTANT CASE.

Nowhere in the Petition for Writ of Certiorari does Petitioner claim that there is any substantive conflict among lower courts which have applied the emergency doctrine. Petitioner cannot make the claim, because there is no conflict.

The emergency doctrine has been explicitly recognized by this Court and applied by lower federal and state courts in a variety of situations. See, e.g., Mincey vs. Arizona, supra; Warden vs. Hayden, supra; Wayne vs. United States, 318 F.2d. 212 (D.C. Cir.), cert. denied 375 U.S. 860 (1963); United States vs. Barone, 330 F.2d. 543 (2nd Cir.), cert. denied 377 U.S. 1004 (1964); United States vs. Goldenstein, 456 F.2d. 1006 (8th Cir. 1972); State vs. Cook, 547 P.2d. 50 (Ariz. 1976); Patrick vs. State, 227 A.2d. 486 (Del. 1967); State vs. Huff, 551 P.2d. 880 (Kan. 1976); State vs. Hardin, 518 P.2d. 151 (Nev. 1974); and People vs. Mitchell, 347 N.E.2d. 607 (N.Y. 1976). Several courts have considered and approved emergency searches in circum-

stances strikingly similar to the instant case. See, State vs. Hardin, supra (recent homicide, murderer at large); People vs. Mitchell, supra (recent homicide, murderer at large); and State vs. Max, supra (sniper at large).

There is no substantial conflict among these decisions, either as to the legal standards involved when the emergency doctrine is utilized or as to the manner in which those standards are to be applied to a given set of facts. The holding of the Supreme Court of New Hampshire is consistent with the above cited decisions. It breaks no new ground, but merely travels an already well blazed path. In these circumstances, review by this Court is unnecessary and inappropriate.

III. THE DECISION OF THE SUPREME COURT OF NEW HAMPSHIRE IS MANIFESTLY CORRECT.

In his lengthy Petition for Writ of Certiorari, Petitioner essentially argues the merits of his case. Distilled to its essence, Petitioner's claim is that both the trial court and the Supreme Court of New Hampshire misapplied the facts to the law when they decided that the warrantless search in question was justified by the existence of probable cause plus exigent circumstances. While now avoiding the temptation to herein answer all of

Petitioner's arguments on the merits, the Respondent respectfully submits that it is clear on the face of the decision that the Supreme Court of New Hampshire did not err. State vs. Theodosopoulos, supra.

Accepting the recognized standard that the probable cause required for a warrantless search under exigent circumstances is at least as great as that required to support a warrant, the Supreme Court of New Hampshire correctly held that probable cause did indeed exist to believe the sniper was in Petitioner's apartment. See, Recznick vs. City of Lorain, 393 U.S. 166 (1968). The record demonstrates that the officers had calculated the bullet trajectory sufficiently to focus their search on a particular row of buildings along Manchester Street. By the time they reached the Petitioner's apartment, they had searched a significant number of these buildings and had secured those buildings which were closer to the police station than the Petitioner's. The Petitioner's apartment was on the third floor, at a height compatible with the bullet path. Lights were on in the apartment and Petitioner's truck was parked outside, leading the officers to believe that the apartment was occupied. When no one responded to their persistent knocking, they had reason to conclude that the occupant wished to conceal his presence. Considering all these circumstances, the New Hampshire Supreme Court did not err in holding that probable cause had been established.

Neither did the Court err in ruling that exigent circumstances existed pursuant to the emergency doctrine. The police were confronted with a totally unforeseeable shooting, perpetrated by an unknown sniper in the dead of night, with the sniper fire piercing the very heart of the police station. Two human beings lay seriously wounded. It strains one's imagination to conjure up an emergency situation of a more compelling nature.

The fact that the police did not break into Petitioner's apartment immediately does not vitiate the emergency. It took Sergeant Durette some time to establish that a person lived in the apartment and was probably home. It took additional time to search the alley, third floor, and roof of the building. Even then, Sergeant Durette in good faith sought the least violent method of entry -- keys. When that did not work, Sergeant Durette was faced with an incredibly difficult decision. If he waited for a search warrant to be secured, he ran the dual risk that the sniper might open fire on a new target, or that he might escape if he were in the other unsearched buildings. If he left one or two men to guard the apartment while taking the rest to continue the search, he still ran the risk that the sniper might open fire, and he ran the additional risk that he might try to escape from Petitioner's apartment with the guard diminished. If he did not wait for a warrant, he could search and secure Petitioner's apartment and immediately continue with the search if the

sniper was not there.

In the end, Sergeant Durette made the only rational choice he could where protection of life was paramount -- he went in.

> "I felt that the whole situation was very grave. I thought other people's lives were in danger, my life and everyone else's . . . . And that is the purpose I was there, to locate the person who did the shooting, so that no one else would get hurt."

Considering all the circumstances, the Supreme Court of New Hampshire fully considered and correctly decided the issue of whether or not the emergency was of such a nature to amount to exigent circumstances. Mincey vs. Arizona, supra; People vs. Mitchell, supra; and State vs. Max, supra. See, Williamson, The Supreme Court, Warrantless Searches, and Exigent Circumstances, 31 Okla. L. Rev. 110 (1978). That correct decision does not warrant review by this Court.

CONCLUSION

For all the reasons stated above, the Respondent respectfully requests this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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